In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-821

EARL BUSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence at trial did not establish his participation in a scheme to defraud, within the meaning of the mail fraud statute, and that it was not reasonably foreseeable that the mail fraud statute would be construed to make criminal the conduct in which he had engaged.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of eleven counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent one-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. B).

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[1]In August 1974, petitioner was tried on a twenty-count indictment; a mistrial was declared after the jury had acquitted petitioner of the charges contained in Counts 12 through 20 but had been unable to reach a verdict on Counts 1 through 11.

The evidence at trial showed that petitioner served from 1955 to 1973 as Press Secretary and Director of Public Relations for Chicago Mayor Richard J. Daley. He was also the owner of Dell Airport Advertising, Inc. (DAAI), a company which at all times material hereto had an exclusive contract with the City of Chicago for display advertising at Chicago's O'Hare International Airport. The indictment arose out of petitioner's use of his position in the mayor's office to influence the City's award and administration of the display advertising contract.

In May or June of 1961, petitioner met with Robert Dell, President of Dell Displays, Inc., to solicit Dell's participation in a joint venture relating to advertising exhibits at O'Hare. Dell responded favorably and other meetings followed. Petitioner subsequently incorporated DAAI[2] and the company entered into a joint venture agreement with Dell Displays, Inc. (Tr. 91-94). The agreement provided in part that "[DAAI] has received or will receive from the City of Chicago, a contract or contracts for * * * exclusive [advertising rights at O'Hare Field]" (Govt. Exh. 2-2). Under the terms of the agreement, Dell Displays, Inc., was to develop advertising ideas, design the displays, and sell them to advertisers, and DAAI was to hold the contract for that work with the City of Chicago (Tr. 94-95). Petitioner's responsibility was to promote the contract with city officials (Tr. 118-119).

In the fall of 1961, as preparations were being made to submit a proposal to the City of Chicago for the display advertising concession at O'Hare, petitioner told Dell that petitioner's name should not be used in connection

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[2]The company was originally incorporated as "Terminal Art, Inc." (Govt. Exh. 4-1). Petitioner was at all material times the sole owner of the stock, although it was held by nominees (Tr. 275; Govt. Exh. 4-1).

with any work regarding the airport contract (Tr. 97). After DAAI's proposal had been submitted, petitioner spoke several times about the proposal with Deputy Mayor John Duba, informal chairman of the committee responsible for recommending a company to receive the contract. Petitioner told Duba that DAAI was a reliable advertising firm and was capable of carrying out a display advertising program at O'Hare (Tr. 144, 150-157, 298-299). At no time did petitioner disclose to Duba that he had any interest in DAAI (Tr. 157).

In late 1961 Duba recommended to Mayor Daley that DAAI be awarded the display advertising contract at O'Hare (Tr. 145-146). Although Duba considered a variety of factors, he placed great weight on petitioner's recommendation because of petitioner's expertise in the field of public relations and advertising (Tr. 157-158, 160). On November 1, 1961, the City Council approved the award to DAAI (Govt. Exhs. 1-1, 21-1). The contract was renewed in October 1967 upon the recommendation of the Mayor and Aviation Commissioner Downes (Tr. 303-304). Prior to its renewal, petitioner affirmatively represented to Downes that he had "no connection whatsoever with the company" (Tr. 231).

From the time the contract was awarded in 1962 until it was renewed in 1967, petitioner received $40,000 from DAAI. Rather than going directly to him, however, the DAAI checks intended for petitioner were made payable to Information Consultants and sent to a friend of petitioner's who owned that company. For each DAAI check deposited in Information Consultants' account, a check in the same amount was drawn to petitioner (Tr. 124-125, 134-136). In September 1966 petitioner's counsel advised him that his DAAI stock, still being held by nominees, should no longer be so held. Because petitioner did not want the stock registered in his own

name, a trust was created to hold it, and the stock was transferred to Sebat Co., the nominee for Sears Bank & Trust Co. (Tr. 276-278).

Shortly after the creation of the trust, DAAI began to pay dividends to petitioner, its sole shareholder, for the first time. As with the earlier monies sent to petitioner by DAAI, the proceeds of the DAAI dividend checks reached him by circuitous means.[3] DAAI mailed the dividend checks, made payable to Sebat Co., to petitioner's attorney,who in turn mailed each check, without making any bookkeeping entries or otherwise processing the check, to Sears Bank & Trust Co., which then deposited the check in petitioner's trust account (see Pet. App. A, pp. A-1 to A-10). Petitioner received $162,000 from DAAI in this manner (Tr. 278-280, 334-335, 426-427). Ten of the mailings so used to make surreptitious payments to petitioner formed the basis for mail fraud counts on which petitioner was convicted.[4]

1. Petitioner contends that the mailings charged in the indictment were not sufficiently related to the fraudulent scheme to provide a basis for his conviction under the mail fraud statute since the scheme had already been consummated at the time of the mailings. This contention was not presented to the court of appeals and, accordingly, should not be considered by this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn*

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[3]Petitioner's name did not appear on any of the DAAI checks intended for him and, as a consequence, DAAI's books did not show that petitioner had received the money (Tr. 128-129). Under the terms of DAAI's contract with the City of Chicago, city inspectors had the right to inspect DAAI's books at any time (Govt. Exh. 1-1).

[4]The eleventh count was based upon a letter to Commissioner Downes of the Chicago Department of Aviation that implied that Dell, rather than petitioner, was the responsible officer in DAAI (Pet. App. A, p. A-11).

v. *United States*, 355 U.S. 339, 362-363 n. 16. In any event, it is without substance.

The elements of the offense of mail fraud under 18 U.S.C. 1341 are (1) a scheme to defraud and (2) a mailing for the purpose of furthering the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8. Whether the mails were used before the scheme was fully executed is, of course, a determination that must be made on a case-by-case basis. Petitioner argues that, as the sole owner of DAAI stock, he received the proceeds of his scheme simultaneously with the receipt by DAAI of the payments to which it was entitled under the contract with the City, and that therefore the scheme had reached fruition prior to the mailings (Pet. 10, 16, 17). This argument overlooks the basic fact that a corporation is a legal entity, separate and distinct in identity from the members who compose it. *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442. Not until the transfers of funds from DAAI to petitioner had occurred had "[t]he persons intended to receive the money * * * received it irrevocably." *Kann* v. *United States*, 323 U.S. 88, 94. The surreptitious DAAI payments to petitioner were not "immaterial to [him], or to any consummation of the scheme" (*ibid.*), but rather were the very essence of it.[5] "[M]ailings related to the distribution of proceeds resulting from the * * * scheme * * * [are] in furtherance of the scheme because the success of the

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[5]Petitioner argues (Pet. 3, 16) that the mailings in no way served to conceal the scheme. However, the particular means by which a mailing serves to execute a scheme is immaterial, and it is not necessary that the mailings serve to forestall discovery or delay detection. See *Kann* v. *United States*, 323 U.S. 88, 94-95. The mailings in *United States* v. *Maze*, 414 U.S. 395, which were held to be insufficiently related to the scheme to defraud, are readily distinguished. The fraudulent credit card scheme involved in *Maze* had already reached fruition at the time of the mailings, which were merely for the purpose of settling accounts between joint victims of the scheme. *Id.* at 402.

venture depended upon receipt of funds laundered by nominees * * *." *United States* v. *Isaacs*, 493 F. 2d 1124, 1151 (C.A. 7), certiorari denied, 417 U.S. 976.

2. Petitioner also contends that the court of appeals' holding that he had been guilty of a scheme to defraud within the meaning of the mail fraud statute constituted an unforeseeable judicial enlargement of that statute and that the conduct for which he was prosecuted was not a crime when he engaged in it. But the court of appeals' holding in this case is consistent with the interpretation given the mail fraud statute by other circuits. By its own terms, 18 U.S.C. 1341 prohibits "*any* scheme to defraud" that employs the use of the mails (emphasis added). *Gouled* v. *United States*, 273 Fed. 506, 508 (C.A. 2); *United States* v. *Edwards*, 458 F. 2d 875, 880 (C.A. 5), certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891. Although, as the court of appeals recognized, a mere breach of a fiduciary duty "could never be considered a crime under the mail fraud statute" (Pet. App. B, p. A-21), where a breach of fiduciary duty is accompanied by conduct demonstrating a specific intent to defraud, the consequent deprivation of honest and faithful services is cognizable as criminal fraud. A knowledgeable or purposeful breach of a fiduciary duty is a major type of dishonesty for the facilitation of which the mail fraud statute penalizes the use of the postal service. *Post* v. *United States*, 407 F. 2d 319 (C.A. D.C.), certiorari denied, 393 U.S. 1092; *United States* v. *George*, 477 F. 2d 508 (C.A. 7), certiorari denied, 414 U.S. 827. Furthermore, it is settled that a scheme to defraud the public of a public official's honest and loyal services may provide the basis for a conviction under the mail fraud statute. *Shushan* v. *United States*, 117 F. 2d 110, 115 (C.A. 5), certiorari denied, 313 U.S. 574; *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1150. The exception to this rule suggested by petitioner for public officials who, like petitioner, are appointed rather than elected would create an

unwarranted exception to the broad statutory prohibition that has no basis in either its language or its purpose.[6]

3. Contrary to petitioner's contentions (Pet. 20), the court of appeals did not hold that a municipal employee's failure to disclose his stock interest in a company dealing with the city is *per se* a scheme to defraud, but only that there was ample evidence from which a jury could have inferred fraudulent intent in the circumstances of this case. Such intent may, of course, be proved circumstantially. *United States* v. *Jones*, 425 F. 2d 1048, 1058 (C.A. 9). The court of appeals correctly held that the jury in the present case reasonably could have inferred the necessary criminal intent from petitioner's "misrepresentations, his failure to disclose his interest in DAAI, his falsification of his statements of economic interest filed with the mayor, his use of multiple nominees, conduits for payments, and a numbered trust account to hide his ownership" (Pet. App. B, p. A-23). The fact that DAAI's contract with the City was profitable for the City has no bearing on petitioner's intent to defraud. A scheme to secure a public contract on more favorable terms than would likely be obtained otherwise constitutes a scheme to defraud the public. *Shushan* v. *United States*, *supra*, 117 F. 2d at 115. The mail fraud statute is not restricted to cases in which the victim suffered an actual monetary or property loss. *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1149-1150. The court of appeals concluded, moreover, "that the city in this case did suffer pecuniary injury" (Pet. App. B, p. A-22).

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[6]Petitioner attempts (Pet. 19) to phrase in constitutional terms his contention that he had no notice his conduct was criminal. As already demonstrated, however, there was ample precedent for the court of appeals' interpretation of the mail fraud statute, and petitioner's argument that he had no fair warning that his conduct was criminal must therefore be rejected.

Petitioner's argument that he did no more than fail to disclose interests which he was under no legal duty to disclose ignores the evidence. As stated by the court of appeals (Pet. App. B, p. A-21):

> [W]e think that Bush did more than breach his fiduciary duty; he materially misrepresented his interests.
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> Bush was not making his recommendation merely as a disinterested public servant. His ownership of DAAI was material to the city officials' evaluation of Bush's opinion of the company which he was recommending. Moreover, as the trial judge observed in ruling on Bush's motion to dismiss the indictment, Bush's "statement that the company was 'reputable' without disclosing that it was the device by which the Mayor's Press Secretary secretly derived profits from a city contract was itself a material misrepresentation."
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> The information that Bush owned DAAI and would receive profits as a result of DAAI's city contract was information material to those city officials who were to evaluate and recommend a proposed contract and to those in the City Council who were to award a contract. That information was material to a decision as to whether to award the contract to DAAI and, if so, at what price. Assuming that the city would have been willing to do business with a company owned by Bush, the fact that Bush would be receiving profits as a result of the contract was material to the question of what percentage of DAAI's profits should be turned over to the city.
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> Bush was not responsible for awarding the O'Hare advertising contract, but he used his official position within the mayor's inner circle to exert the substantial influence which he had on those who were

responsible for negotiating the contract. He did so without advising them that he was vitally interested in the contract or that his sole responsibility under the terms of the contract was to promote it. After the contract was awarded, Bush took steps to insure that the proceeds of the venture could not be traced to him, misrepresented his interest to assist in assuring that the contract would be renewed and filed false documents to continue his employment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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